In addition to proving the negligent character of the act, the plaintiff must prove not only the causal connection[17] between the negligent act and the damage resulting but that such damage was proximately caused.[18] The defendant can prevent recovery by showing that the plaintiff was not in the class intended to be protected,[19] that the damage was not that contemplated by the statute,[20] that there was justification for the violation of the ordinance,[21] or that there was contributory negligence on the part of the plaintiff.[22]

A. C.

WILLS: EFFECT OF REVOKING CLAUSE IN LOST WILL: DEPENDENT RELATIVE REVOCATION—In *Estate of Thompson*,[1] testatrix, by a will executed in 1908, left substantially all her property to her sister. In 1916 she executed a second will, differing from the first in certain minor particulars, but again leaving practically everything to the sister. The second will expressly revoked the first. After the death of the testatrix, the second will was lost, and could not be probated because only one competent witness could be produced to establish its provisions, and not two as the statute requires.[2] The husband of the testatrix, who was but a nominal legatee under both wills, thereupon claimed a share of her property, contending that the second will was a valid revocation of the first, and that, since it could not be proved as a will, she had died intestate. The court held, contrary to the husband's contention, that the second will did not revoke the first, and that the first was entitled to probate.

Three justices dissented, and one justice who concurred in the result did not agree with the three remaining justices as to the proper basis for the decision. The latter three held that a revok-

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[17] George v. McManus (1915) 27 Cal. App. 414, 150 Pac. 73; Henderson v. Northam (1917) 176 Cal. 493, 168 Pac. 1044.

[18] Manning v. App. Cons. Gold Mining Co. (1906) 149 Cal. 35, 84 Pac. 657; Stein v. United Rys. of S. F. (1911) 159 Cal. 368, 113 Pac. 663; Simoneau v. Pacific Electric Ry. Co. (1913) 166 Cal. 264, 136 Pac. 544, 49 L. R. A. (N. S.) 737; Williams v. Southern Pacific Co. (1916) 173 Cal. 525, 160 Pac. 660; Fresno Traction Co. v. A. T. & S. F. Ry Co (1917) 175 Cal. 358, 165 Pac. 1013; Shearman & Redfield on Negligence, §§ 23, 27.

[19] Supra, n. 7.

[20] Supra, n. 6.

[21] Supra, n. 11 and 12.

[22] Higgins v. Deeney (1889) 78 Cal. 578, 21 Pac. 428; Orcutt v. Pacific Coast Ry. Co. (1890) 85 Cal. 291, 24 Pac. 661; Davis v. California Street Cable Ry. Co. (1894) 105 Cal. 131, 38 Pac. 647; McKune v. Santa Clara Valley M. & L. Co. (1895) 110 Cal. 480, 42 Pac. 980; James v. Oakland Traction Co. (1909) 10 Cal. App. 785, 103 Pac. 1082; Stein v. United Rys. (1911) 159 Cal. 368, 113 Pac. 663; Eaton v. Southern Pacific Co. (1913) 22 Cal. App. 461, 134 Pac. 801; Weaver v. Carter (1915) 28 Cal. App. 241, 152 Pac. 323; Cook v. Miller (1917) 175 Cal. 497, 166 Pac. 316; Kinney v. King (1920) 32 Cal. App. Dec. 161, 190 Pac. 834.

[1] (June 1, 1921) 61 Cal. Dec. 655, 198 Pac. 795.

[2] Cal. Code Civ. Proc. § 1339.

ing clause in a lost will is ineffective unless the lost will can be admitted to probate.[3] Section 1339 of the Code of Civil Procedure, they thought, which requires two witnesses to prove a lost will, requires two witnesses to prove a part of a lost will—in this case the revoking clause.[4]

It is submitted that this reasoning is not wholly unobjectionable. Section 1292 of the Civil Code provides that a will may be revoked by an instrument executed with the formalities of a will. Section 1339 of the Code of Civil Procedure, it might be said, was designed to apply only to instruments offered as wills, and not to instruments offered to prove revocation under Section 1292 of the Civil Code.[5] Particularly would this seem correct in view of the well settled rule that a revoking clause is not ambulatory, but takes effect immediately it is made.[6] Therefore, it might plausibly be contended, the will of 1908 was revoked as soon as the will of 1916 was executed; that the revocation contained therein was in 1916 a completed juristic act, the effect of which could not be impaired by the circumstance that the will was later lost. This appears to have been the view adopted by the three dissenting justices in the principal case, who held, in effect, that a revocation, if it complies with Section 1292 of the Civil Code, is not defeated by the fact that it appears in a will, invalid as the last will of the testator. The authorities from other states, many of which are cited in the dissenting opinion, seem to favor this conclusion.[7]

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[3] This does not mean that the entire will must be probated. Any substantial provision of a lost will, complete in itself, may be probated, if competent proof is forthcoming, even though other cannot be proved. Estate of Patterson (1909) 155 Cal. 626, 102 Pac. 941, 132 Am. St. Rep. 116, 26 L. R. A. (N. S.) 654.

[4] No authority precisely in point is cited in this opinion. It is noteworthy that the leading case of *Onions v. Tyrer* (1717) 1 P. Wms. 343, 2 Vern. 741, 23 Eng. Rep. R. 1085, seems to support the reasoning of this opinion, although, strangely enough, it has become the basis of the doctrine of dependent relative revocation hereinafter discussed. That case held that a revocation which, if standing alone, would have complied with the Statute of Frauds, was ineffective where contained in a will invalid because the witnesses signed out of the presence of the testator.

[5] The leading opinion seems to distinguish between a revoking clause in a will, to which it holds Cal. Code Civ. Proc. § 1339 is applicable, and a revoking instrument executed with the formalities of a will, to which it is not. 61 Cal. Dec. 658, 198 Pac. 797. The dissenting opinion, on the other hand, denies the validity of this distinction, and distinguishes between a will offered for probate and a will offered merely as a revoking instrument. 61 Cal. Dec. 674, 198 Pac. 808.

[6] Estate of Lones (1895) 108 Cal. 688, 41 Pac. 771; James v. Marvin (1821) 3 Conn. 576; Pickens v. Davis (1883) 134 Mass. 252, 45 Am. Rep. 322; Scott v. Finn (1881) 45 Mich. 241, 7 N. W. 799; Wallis v. Wallis (1874) 114 Mass. 510. See also Cal. Civ. Code § 1297 providing that, in the absence of express intention to that effect, the revocation of a revoking will does not revive a prior will.

[7] Helyar v. Helyar (1754) 1 Lee Ecc. 472, 161 Eng. Rep. R. 174—Uncorroborated testimony of single witness held sufficient to show revocation of prior will contained in lost subsequent will, though corroborating circumstances would have been required to probate lost will; Day v. Day (1831)

But the reasoning of the dissenting justices, it appears, might have led to an unfortunate result in the instant case. If the first will had been held ineffective, the property of the testatrix would have been withheld from the beneficiary named in both wills, and given to one intentionally cut off in both. On the other hand, the reasoning of the three justices who held the first will unrevoked, while it achieved justice in the instant case, might operate very harshly under other facts. If, for example, the testatrix had intended by the second will to leave her property to another person than her sister, her intention would have been entirely subverted. These difficulties, it would appear, are at least minimized under the theory held by the single justice. From all the circumstances he believed that the testatrix did not intend to destroy the testamentary effect of the first will, except upon the condition that the second will would become operative. Therefore, he thought, the first will remained effective.

It seems quite clear that the present case does not involve a revocation intended to take effect only after the occurrence of a precedent condition. Quite obviously the testatrix in 1916 had no purpose in mind except to revoke the first will, and the revocation took effect immediately. But the opinion of the single justice, it seems, is consistent with this theory—that although the revocation became operative at once its effect was destroyed by the matters which later happened. There is authority for this view. It has been held, in effect, that if a testator, by a second testamentary instrument, revokes a prior disposition under a mistaken belief that the second instrument will take effect, the revocation may be set aside if the intention of the testator, as it appears from a consideration of all the instruments, will thereby be better served.[8]

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3 N. J. Eq. 549—Second will, which was destroyed, could be shown as revocation of prior will, though contents could not be further ascertained; Vining v. Hall (1866) 40 Miss. 83—Prior will held revoked by clause in subsequent lost will, contents of which could not be fully proven, under statute forbidding probate of lost will unless all contents duly proven; In re Wear's Will (1909) 131 App. Div. 875, 116 N. Y. Supp. 304—Allowing revocation of prior will by revoking clause in subsequent lost will proved by only one witness, under statute similar to that in California; Price v. Maxwell (1857) 28 Pa. 23—Allowing revocation to stand though contained in will which failed because of rule of law; In re Cunningham (1888) 38 Minn. 169, 36 N. W. 269—Holding lost will competent evidence of revocation though never probated. See also Wallis v. Wallis (1874) 114 Mass. 510; Muller v. Muller (1900) 108 Ky. 511, 56 S. W. 802; In re Sternberg (1895) 94 Iowa 305, 62 N. W. 734; Burns v. Travis (1888) 117 Ind. 44, 18 N. E. 45; Hairston v. Hairston (1855) 30 Miss. 276; Nelson v. McGiffert (1848) 3 Barb. (N. Y. Ch.) 158, 49 Am. Dec. 170; Williams v. Miles (1903) 68 Neb. 463, 94 N. W. 705, 62 L. R. A. 383; 33 Harvard Law Review, 337, 356; 37 L. R. A. 561, note; 40 Cyc. 1178.

[8] Bernard's Settlement [1916] 1 Ch. 552. Here a testatrix exercised a power of appointment by appointing her six daughters equally. By a codicil to her will she revoked the interest of one, and so dealt with the interest as to violate the rule against perpetuities. Held that the testatrix would have preferred the first appointment to none, and that the revocation should be set aside. See also Tupper v. Tupper (1855) 1 K. & J. 665; Quinn v. Butler (1868) L. R. 6 Eq. 225. In both these cases prior gifts were revoked

So too a revocation of a bequest to certain persons may be set aside if from the revoking instrument it appears to have been made under the mistaken belief that the beneficiary was dead.[9] These are applications of the doctrine of dependent relative revocation, which a commentator has suggested as applicable to this case.[10] It is true that in all the cases which have declared this doctrine, the testator was acting under a present mistake of one kind or another in revoking the prior instrument, while in this case the second will was defeated by circumstances which later supervened. To apply it in this case, therefore, would make necessary an extension which has not as yet been made. Nevertheless, what the testator intends is to make a will, not merely valid when made, but capable of being carried into effect. As a learned writer has stated: "The guiding principle . . . should be: let the revocation stand unless it is reasonably clear without resort to extrinsic evidence that the deceased would have preferred the first will to intestacy."[11]

M. M. P.

Recent Decisions

CARRIERS: LIABILITY OF INITIAL CARRIER FOR LOSS ON FOREIGN SHIPMENT CAUSED BY CONNECTING CARRIER—A carload of vegetables was shipped from Los Angeles to Regina, Canada, in 1913, freight payable by the consignee, but the consignor furnished the initial carrier with an indemnifying bond agreeing to pay all freight charges in the event the consignee defaulted. Upon the refusal of the consignee to accept the goods, the terminal carrier, after notification to the initial carrier, sold the goods for freight charges, without the knowledge or consent of the shipper. The shipper sued the initial carrier for conversion. *Held:* that, as the bill of lading issued to the shipper limited defendant's liability as carrier to its own lines, there was no liability imposed upon defendant either by law or by contract for a conversion of the goods beyond its own lines. *McCaslin v. Southern Pacific Company* (1922) 63 Cal. Dec. 74.

At common law, under the so-called American rule, the initial carrier who received a shipment marked for a destination beyond its own lines was not responsible for any loss occurring beyond its terminus, in the absence of an agreement to the contrary. It discharged its full obligation

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and new beneficiaries substituted, who could not take, but the revocations stood because it did not appear but that the testator would have so desired. For a discussion of this doctrine see Joseph Warren, "Dependent Relative Revocation," 33 Harvard Law Review, 337.

[9] Campbell v. French (1797) 3 Ves. Jr. 321, 30 Eng. Rep. R. 1033. But see In re Churchill [1917] 1 Ch. 206, 210, commenting adversely on Campbell v. French. American cases supporting Campbell v. French are Gifford v. Dyer (1852) 2 R. I. 99; Whitlock v. Vaun (1868) 38 Ga. 562; Mordecai v. Boylan (1863) 6 Jones Eq. 365 (N. C.).

[10] 35 Harvard Law Review, 348.

[11] Joseph Warren, "Dependent Relative Revocation," 33 Harvard Law Review, 337, 356.